

1 CIVIL DISTRICT COURT  
2 PARISH OF ORLEANS  
3 STATE OF LOUISIANA  
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7 GLORIA SCOTT AND \*  
8 DEANIA JACKSON \*  
9 \* NO. 96-8461  
10 VERSUS \* DIVISION "I"  
11 \* SECTION 14  
12 THE AMERICAN TOBACCO \*  
13 COMPANY, INC., ET AL. \*  
14 \*  
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19 Transcript of proceedings before The  
20 Honorable Richard J. Ganucheau, Judge Pro Tempore,  
21 Civil District Court, Parish of Orleans, State of  
22 Louisiana, 421 Loyola Avenue, New Orleans, Louisiana  
23 70112, commencing on June 18, 2001.  
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26 \* \* \* \* \*  
27 Tuesday  
28 April 22, 2003  
29 9:41 a.m.  
30 \* \* \* \* \*  
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1 P R O C E E D I N G S  
2 (Jury seated.)  
3 THE LAW CLERK:  
4 All rise. Oyez, oyez, oyez, Civil  
5 District Court for the Parish of Orleans is  
6 now in session. The Honorable Richard  
7 Ganucheau presiding. Silence is commanded.  
8 Please be seated.  
9 THE COURT:  
10 Good morning.  
11 Dr. Viscusi, you're still under oath.  
12 You understand that?  
13 THE WITNESS:  
14 Yes, Your Honor.  
15 THE COURT:  
16 That lasts until I discharge you.  
17 You ready?  
18 MR. MUEHLBERGER:  
19 Yes, Your Honor.  
20 DIRECT EXAMINATION BY MR. MUEHLBERGER:  
21 Q. Good morning, ladies and gentlemen of the  
22 jury, I would like to reintroduce Dr. Kip Viscusi  
23 from Harvard University.  
24 A. Morning.

25 Q. I would like to summarize the opinions you  
26 are going to give this morning to the jury before we  
27 proceed in detail.

28 Have you prepared a chart to detail that?  
29 A. I have.

30 MR. MUEHLBERGER:  
31 Ted, could you pull up 3035, please?  
32 MR. MUEHLBERGER:

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1 Move to publish, Your Honor.  
2 THE COURT:  
3 Objection?  
4 MR. RUSS HERMAN:  
5 No objection, Your Honor.  
6 THE COURT:  
7 You may publish it.  
8 MR. MUEHLBERGER:  
9 May we publish, Your Honor?  
10 THE COURT:  
11 You may publish, yes.

12 EXAMINATION BY MR. MUEHLBERGER:

13 Q. Professor Viscusi, could you briefly explain  
14 to the jury what this chart demonstrates?

15 A. I have three key opinions. First, both  
16 smokers and nonsmokers believe that smoking is more  
17 dangerous than it really is. So, they overestimate  
18 the risk rather than underestimate the risk.

19 Second, when presented with different risk  
20 estimates, regardless of the source, people believe  
21 the worst. So, if there's a risk debate out there,  
22 people will believe the worst-case scenario.

23 Third, smokers respond to higher prices and  
24 workplace restrictions by quitting or cutting back.  
25 So, if the price of cigarettes goes up or if it's  
26 hard to smoke because you're not allowed to at work,  
27 people smoke less.

28 Q. Professor, are you here this morning to  
29 downplay the risk of smoking?

30 A. No. I've always said that smoking is perhaps  
31 the most risky activity or consumption activity that  
32 any consumer can undertake.

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1 Q. Let's talk about your first opinion, that  
2 people believe that smoking is even more dangerous  
3 than it really is. What information did you  
4 consider in reaching that opinion?

5 A. Well, to reach that opinion, you need two  
6 pieces. First, you need to figure out how dangerous  
7 is smoking and, second, you need to figure out what  
8 are people's risk perceptions in relation to that  
9 scientific evidence.

10 Q. How do people learn whether an activity is  
11 risky?

12 A. There are lots of different sources of  
13 information you have. Your parents, your church,  
14 your school, the media, TV, doctors provide  
15 information, public health classes. Your friends.  
16 So, there are a variety of different information  
17 sources that people could draw on.

18 Q. And do these information sources vary from  
19 individual to individual?  
20 A. They do because different people are exposed  
21 to different things and rely on different sources of  
22 information to make their judgments.  
23 Q. Now, why is it important to know how people  
24 perceive a particular risk?  
25 A. Well, we would want to figure out whether  
26 people are making knowledgeable decisions. Do they  
27 know what they're getting into when they make risky  
28 decisions.  
29 Q. And what do we need to know to determine  
30 whether more information is necessary for people to  
31 determine whether a particular risk is risky or  
32 not -- particular activity?

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1 A. We want to know if risk perceptions are  
2 accurate or not. So, do people have sufficiently  
3 high perception of the risk and, if not, then you  
4 might want to provide more information, but if  
5 people already know about the risk, then, you don't  
6 need to provide more information.

7 Q. And have you applied these concepts to  
8 perceptions of smoking and disease?

9 A. Yes, I have.

10 Q. And how did you do that?

11 A. Well, I looked at survey evidence on people's  
12 risk beliefs and I compared the results of the  
13 survey evidence to scientific evidence to the risks  
14 of smoking.

15 Q. So, the first step is you figure out the  
16 actual risk of smoking; is that right?

17 A. Yes. To figure out the scientific estimate  
18 of the risk of smoking, I used estimates from the  
19 Surgeon General and the National Cancer Institute  
20 and I took those estimates at face value. I didn't  
21 adjust them downward or anything. I just took them  
22 exactly as the Surgeon General stated them.

23 Q. Okay. Why did you do that?

24 A. I did that because I wanted to establish a  
25 scientific reference point for figuring out whether  
26 people's risk beliefs were high enough, and I didn't  
27 want to get involved in a medical debate as to  
28 whether the Surgeon General was right, wrong or not.

29 Q. Okay. And according to the information  
30 contained in the Surgeon General's Reports, what is  
31 the actual risk of lung cancer?

32 A. The actual risk of dying from lung cancer

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1 from smoking is about six in 100 to 13 in 100. So,  
2 out of 100 smokers, six to 13 of them will die from  
3 lung cancer because they smoke.

4 Q. Is there also information in the Surgeon  
5 General's Report that will tell us what the actual  
6 risk of dying from any disease is?

7 A. Yes. Out of a hundred smokers, roughly 18 to  
8 36 of them will die because they smoke.

9 Q. And do the Surgeon General's reports also  
10 contain information estimated the estimate loss of

11 life expectancy from smoking?  
12 A. Yes, you can use information from the Surgeon  
13 General's reports to calculate that as well, and the  
14 life expectancy loss from smoking is from 3.6 to  
15 7.2 years, somewhere in that range.

16 Q. Now that we know what the actual risks of  
17 smoking are, what do we do next?

18 A. Next, we have survey questions that ask  
19 people their risk beliefs in a way that you can  
20 compare the risk belief answers to the numbers based  
21 on the Surgeon General's reports to figure out if  
22 risk beliefs are too high, too low or just right on  
23 target.

24 Q. What kind of information do you need to do  
25 that?

26 A. I use survey evidence. The surveys I  
27 referred to before the Easter break where people  
28 were asked out of 100 smokers how many of them would  
29 get lung cancer because they smoke and similar kinds  
30 of questions. So, they're objective questions.

31 Q. Did you measure people's perception of the  
32 risks of smoking based upon properly designed and  
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1 administered surveys?

2 A. Yes. In fact, I've analyzed the survey  
3 questions. The format of the survey questions is  
4 very similar to the kinds of things I've used for  
5 the Environmental Protection Agency. I've analyzed  
6 the data itself. I've run sensitivity tests using  
7 different formulations of the questions. I also  
8 subjected the surveys and my analysis of the surveys  
9 to several rounds of peer review. They've been  
10 published in peer-reviewed articles and books.

11 Q. Just to refresh the jury's recollection, are  
12 these the four surveys that you talked about before  
13 the holiday break?

14 A. Yes, they are.

15 Q. 1985, 1991, 1997 and 1998?

16 A. Yes, those are the four years.

17 Q. Based upon the fact that you've published  
18 these results in peer-reviewed surveys, they've been  
19 checked by other scholars, replicated elsewhere, do  
20 you have any opinion as to the reliability of the  
21 surveys?

22 A. Yes. Very reliable. In fact, scholars in  
23 other universities have run similar surveys and  
24 found stronger results than I've found.

25 Q. Are these the type of surveys reasonably  
26 relied upon by scholars in your field of economics?

27 A. Yes, they are. I've published the results of  
28 these surveys in many of the top economic journals.

29 Q. Have you prepared a chart to assist the jury  
30 in understanding what you've learned from these  
31 surveys about the people's perception of risk of  
32 lung cancer?

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1 A. Yes, I have.

2 MR. MUEHLBERGER:

3 Ted, can you pull up 3058?

4 Move to publish.  
5 MR. RUSS HERMAN:  
6 No objection. I assume this is a  
7 demonstrative?  
8 MR. MUEHLBERGER:  
9 Yes.  
10 THE COURT:  
11 You may publish.  
12 EXAMINATION BY MR. MUEHLBERGER:  
13 Q. Could you walk the jury through this chart  
14 and what it demonstrates?  
15 A. Let's take these one at a time. All of these  
16 questions are of the general form, out of 100  
17 smokers, how many do you think will get lung cancer  
18 or die from lung cancer because they smoke. The  
19 first bar for 1985, indicates that in the 1985  
20 national survey, people thought 43 out of 100  
21 smokers would get lung cancer because they smoke.  
22 The second bar for 1991 is my North Carolina survey  
23 that I did. And there, people thought that 38 out  
24 of 100 smokers would die from lung cancer because  
25 they smoke. The 1997 survey was a national survey  
26 in which people thought that 47 out of 100 smokers  
27 would get lung cancer because they smoke. The 1998  
28 survey was a survey undertaken in Massachusetts and  
29 the nature of the sample wasn't a random sample of  
30 Massachusetts. We oversampled people on Medicaid.  
31 Poorer people in Massachusetts were surveyed.  
32 There, 48 out of 100 was the risk of death from lung

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1 cancer due to smoking in terms of the beliefs people  
2 have.

3 Q. What does this last column over here show us?  
4 A. Well, the last thing is the actual risk, 6 to  
5 13 percent. Let's call it 10 percent, just the  
6 midpoint. So, if the actual lung cancer fatality  
7 risk from smoking is 10 percent and people think  
8 it's anywhere from 38 percent to 48 percent, what  
9 you have is a situation where people actually  
10 overestimate the risk of lung cancer due to  
11 cigarettes by a factor of four to five.

12 Q. Have you prepared another chart to show the  
13 jury how smokers perceive their risk of dying of a  
14 smoking-related disease?

15 A. Yes.

16 MR. MUEHLBERGER:  
17 Ted, could you pull up 3045?  
18 Move to publish, Your Honor.  
19 MR. RUSS HERMAN:  
20 No objection to this demonstrative.  
21 THE COURT:  
22 You may publish it.

23 EXAMINATION BY MR. MUEHLBERGER:  
24 Q. Professor, could you walk the jurors through  
25 this chart and what it demonstrates, please.  
26 A. Yes. When I did this, I wanted to push my  
27 analysis further. Instead of asking simply do  
28 people believe that there's a lung cancer risk from  
29 smoking, do they also understand the overall risk of  
30 death from smoking. So, starting in 1991, I devised  
31 a survey question asking people out of 100 smokers,

32 how many of them do you think will die from lung  
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1 cancer, heart disease, throat cancer and other  
2 ailments because they smoke. And you find that 54  
3 percent is the risk that people assess, mortality  
4 risk from smoking.

5 In 1997, this question was asked as part of  
6 the national survey we've talked about, and there  
7 people thought that the risk of death to smokers due  
8 to smoking was 50 percent.

9 In 1998, Massachusetts survey, people thought  
10 the risk of death was 54 percent.

11 The last bar over here is the actual risk  
12 based on estimates from the Surgeon General, 18  
13 percent to 36 percent. So, you can see that  
14 people's estimates of what they think the risk is,  
15 the total mortality risk, is roughly double what the  
16 actual risk of death is from smoking.

17 Q. Professor, are these overperception of the  
18 risk as demonstrated on these last two charts  
19 surprising to someone like yourself who studies risk  
20 perception for a living?

21 A. They're not surprising to me. The reason is  
22 there's a large literature that shows that highly  
23 publicized risks tend to be overperceived. We all  
24 tend to overestimate the risk of being killed in an  
25 earthquake or hurricane or tornado, and smoking is  
26 perhaps the most highly publicized risk in the  
27 United States. I've done actual literature searches  
28 and turned up thousands of articles about smoking  
29 risks.

30 Q. Have you prepared another chart to show how  
31 many years of life smokers give up by smoking?

32 A. Yes, I have.

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1 MR. MUEHLBERGER:  
2 Ted, could you pull up 3059, please?  
3 Move to publish, Your Honor.

4 THE COURT:

5 Any objection?

6 MR. RUSS HERMAN:

7 No objection to this demonstrative, Your  
8 Honor.

9 THE COURT:

10 You may publish.

11 MR. MUEHLBERGER:

12 Thank you, Your Honor.

13 EXAMINATION BY MR. MUEHLBERGER:

14 Q. Professor, could you walk the jury through  
15 this chart, what it demonstrates, in your opinion,  
16 please.

17 A. Well, I developed these questions as a  
18 further test of smokers' risk beliefs. Sure,  
19 smokers understand the overall mortality risk of  
20 smoking, but do they understand how much life is  
21 lost when they die. I ask questions asking them  
22 what's the life expectancy loss that smokers are  
23 going to experience. So, in 1991, men thought that  
24 they lose 8.6 years of life expectancy because of

25 smoking, women, 13.2 years.

26 In 1997, the national survey, men thought  
27 they'd lose 10.1 years of life expectancy, women,  
28 14.8 years.

29 The 1998 Massachusetts survey, men at 10.1  
30 years, women thought their life expectancy loss  
31 would be 15.9 years.

32 Each of these answers, both for men and  
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1 women, exceeds the actual estimate of the life  
2 expectancy loss based on Surgeon General estimates  
3 of 3.6 to 7.2 years.

4 Q. Once again, smokers overestimate the -- their  
5 lost life due to smoking when compared to the  
6 information contained in the Surgeon General's  
7 Reports as to what decreased life expectancy they  
8 might see; is that correct?

9 A. That's right.

10 Q. Now, have you also had a chance to study the  
11 ways that people at different educational levels  
12 perceive risk?

13 A. I have. In fact, I've written about that in  
14 my publications.

15 Q. According to your research, does a person  
16 need an college education to understand that smoking  
17 is risky?

18 A. No. In fact, these answers to the risk  
19 perception questions for people that haven't even  
20 finished high school are just as high as those who  
21 are college educated.

22 Q. Is it fair to say that based on the research,  
23 work, your published literature that you've done  
24 over the last 30 years that people perceive that  
25 smoking is risky regardless of their education?

26 A. That's correct. Risk perception vary very  
27 little with one's educational background. Everybody  
28 thinks smoking is risky.

29 Q. Let's talk about age. Have you also had  
30 occasion to study whether people of different ages  
31 perceive different risk associated with smoking?

32 A. I have.

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1 Q. Could you tell the jury briefly -- have you  
2 prepared a chart to help the jury with respect to  
3 that literature?

4 A. I have, based on the 1985 survey, the  
5 national survey we talked about.

6 MR. MUEHLBERGER:

7 Ted, could you pull up 3069, please?  
8 Move to publish, Your Honor.

9 MR. RUSS HERMAN:

10 No objection to this demonstrative.

11 THE COURT:

12 You may publish it.

13 EXAMINATION BY MR. MUEHLBERGER:

14 Q. Professor, could you walk the jury through  
15 this chart and explain what it demonstrates, in your  
16 opinion?

17 A. Well, these responses indicate out of 100

18 smokers, how many of them do you think will get lung  
19 cancer because they smoke. So, let's start with the  
20 last two columns, the people who are age 22 to 25  
21 think it's 42 out of 100. People who are age 46 and  
22 over think it's 42 out of 100. People aged 16 to 21  
23 think it's 49 out of 100. So, the youngest group of  
24 respondents to the survey actually have higher risk  
25 beliefs regarding the lung cancer risks of smoking  
26 than do the older respondents to the survey.

27 Q. The young people thought smoking was even  
28 more riskier than the older people, correct?

29 A. That's correct. Young people think it's  
30 riskier than older people.

31 Q. Both young and old overestimate the risk of  
32 smoking?

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1 A. That's right. All these risk estimates are  
2 at least four times greater than the actual lung  
3 cancer risk.

4 Q. We've been talking about surveys in the 1980s  
5 and 1990s. Do you have an opinion whether people  
6 overperceive the risk of smoking before that time  
7 period?

8 A. Yes.

9 Q. What is your opinion?

10 A. Well, if you look at these surveys from 1985  
11 through 1998, the results are fairly stable. People  
12 will generally perceive the risk of smoking and the  
13 perception answers don't change very much. If you  
14 look at national public opinion polls on smoking  
15 risk beliefs, they also were fairly stable even  
16 before that time period. So, if you went back into  
17 the '70s and, certainly, if you go back to the  
18 period after the big report in 1964 and after the  
19 wave of cigarette warnings, so, in all that era  
20 after those big information disclosures, I would  
21 expect to get similar kind of risk belief answers if  
22 we had been able to go back in time.

23 Q. You mentioned polls. Have you looked at, for  
24 instance, the Gallup Polls over the decades on this  
25 issue?

26 A. I have. I've looked at every Gallup Poll  
27 that's ever been run on smoking, I believe.

28 Q. Could you briefly tell the jury how Gallup  
29 runs a poll, what a Gallup Poll is?

30 A. Gallup is a national public opinion polling  
31 organization and, traditionally, I think they've  
32 been the most respected opinion poll organization.

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1 In fact, back in the '50s and '60s, Dr. George  
2 Gallup, who founded it, had a newspaper column where  
3 he talked about his opinion poll results.

4 Q. Let's start by talking about whether people  
5 connect lung cancer with smoking. Did you prepare a  
6 chart to help the jury with that issue?

7 A. I did.

8 MR. MUEHLBERGER:

9 Ted, could you pull up 3068, please?

10 MR. RUSS HERMAN:



4 opinion.

5 A. Well, the red bar is from the previous chart  
6 that we did. 90 percent of the public had heard or  
7 read that cigarette smoking may cause lung cancer.  
8 That was the one for the middle of 1954.

9 The same year, they asked people, you know,  
10 can you identify the first book of the Bible, which  
11 is Genesis. 49 percent of the people could. So,  
12 over half of the people couldn't identify the first  
13 book of the Bible.

14 We have a couple results here from 1996. Can  
15 you identify the vice president of the United  
16 States? And only 70 percent of the people could  
17 name Al Gore as the vice president of the United  
18 States.

19 Similar to same year, can you identify the  
20 host of The Tonight Show, and only 64 percent of the  
21 people could identify Jay Leno as being the host of  
22 The Tonight Show.

23 Q. Professor, in your experience conducting  
24 surveys, is it common that 100 percent of people  
25 would agree with any question?

26 A. It's very difficult to get 100 percent  
27 agreement on anything.

28 Q. Why is that?

29 A. Well, in part, people may misunderstand the  
30 question, not paying attention to the survey  
31 question. So, there's random error in survey  
32 responses.

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1 Q. Now, did you also review public opinion polls  
2 about people's belief in the idea that smoking is a  
3 cause of lung cancer?

4 A. Yes, I have.

5 Q. Could you tell the jury briefly what your  
6 research showed on that subject?

7 A. Smokers have a high risk belief that smoking  
8 causes lung cancer, not only to other people, but  
9 also to themselves.

10 Q. Based on -- were these polls over various  
11 decades prior to 1980?

12 A. They were. I've looked at evidence, I  
13 recall, from 1970, you know, to 1999 or '69 to '99,  
14 and, generally, you've got, you know, somewhere from  
15 70 to 90 percent of the people over that time period  
16 believing that smoking is a cause of lung cancer.

17 It's not a question of simply being aware of the  
18 link between smoking and lung cancer. The  
19 substantial risk belief that smoking causes lung  
20 cancer. I think those numbers are very high because  
21 to say that something causes lung cancer may mean  
22 that people think, well, maybe it has to always  
23 cause it in smokers. So, it's a very strong result.

24 Q. Do these national surveys we've been talking  
25 about tell us anything about the people in Louisiana  
26 and what they've known about dangers of smoking?

27 A. Well, they tell us about all of America and  
28 there's no reason to assume that Louisiana has been  
29 left out of the loop in terms of the information  
30 that's been disseminated about smoking. In fact,  
31 there's surveys in Louisiana that suggest that there

32 is widespread awareness.

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1 Q. In your opinion, are people in the United  
2 States and Louisiana aware of the risk of lung  
3 cancer from smoking cigarettes?

4 A. Yes, they are. In fact, the Bogalusa study  
5 in Louisiana indicates that third to sixth graders,  
6 close to 100 percent, not 100 percent, believe that  
7 smoking causes lung cancer.

8 Q. You've told us about Gallup Polls. Let's  
9 talk about statements made by the public health  
10 authorities and community over the decades regarding  
11 the link between smoking and lung cancer and what  
12 the public knew about that. During the 1950s and  
13 1960s, who was responsible for telling the public  
14 about health issues?

15 A. Public health officials. We have a variety  
16 of health officials. You have the Surgeon General,  
17 who is still around back then. You have the  
18 National Institute on -- National Cancer -- I think  
19 there was a National Cancer Institute. There's also  
20 a Smoking and Health office in the Department of  
21 Health, Education and Welfare. So, various public  
22 health officials to the U.S. government.

23 Q. And during the 1950s and 1960s, what were  
24 these public health community officials saying about  
25 the link between lung cancer and smoking?

26 A. They were all essentially saying the same  
27 thing. The message that smoking is dangerous was  
28 getting out there, that they'd gotten it out there  
29 through the media, and the public was adequately  
30 informed.

31 Q. You mentioned the Surgeon General. Have you  
32 reviewed the Surgeon General's statements about that

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1 issue in the 1950s, for instance?

2 A. I have. I've reviewed Surgeon General Leroy  
3 Burney, Surgeon General Stuart. These were two  
4 Surgeon Generals who spoke about the public  
5 information campaign against smoking during that  
6 rough time period.

7 Q. Did you prepare a demonstrative about Surgeon  
8 General Burney's review on this subject?

9 A. Yes, I did.

10 MR. MUEHLBERGER:

11 Ted, call up 3066, please.

12 MR. RUSS HERMAN:

13 No objection.

14 MR. MUEHLBERGER:

15 Move to publish.

16 THE COURT:

17 You may publish.

18 EXAMINATION BY MR. MUEHLBERGER:

19 Q. What does this demonstrative tell us about  
20 that subject?

21 A. Surgeon General Burney had the following  
22 statement. I'll quote him:

23 "Our position is that we have informed  
24 the public through the excellent coverage of

25 the press, radio and TV. We believe that is  
26 as far as we should go at this time until and  
27 when we have additional information."

28 Q. Who was Dr. John Heller?

29 A. Dr. John Heller, I believe, was the head of  
30 the National Cancer Institute.

31 Q. Did you prepare a chart to demonstrate what  
32 his views were on this subject?

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1 A. Yes.

2 MR. MUEHLBERGER:

3 Ted, call up 3063, please.

4 MR. RUSS HERMAN:

5 No objection.

6 MR. MUEHLBERGER:

7 Move to publish, Your Honor.

8 THE COURT:

9 You may publish it.

10 EXAMINATION BY MR. MUEHLBERGER:

11 Q. What did Dr. Heller say in 1952 about this  
12 subject, Professor?

13 A. Dr. Heller had the following statement.

14 Q. 1957.

15 A. Memoranda newspapers, radio, TV and other  
16 media have done an excellent job covering this  
17 problem and a very objective job. This is an  
18 exceedingly valuable way of informing the public.

19 Q. Finally, do you know who Dr. Horn was during  
20 this period of time?

21 A. I do. The two cancer researchers who put the  
22 smoking/cancer linkage on the map were Drs. Hammond  
23 and Heller. They were a research team. Dr. Horn  
24 was one half of the team, and he was made head of an  
25 office called, I believe, the Office of Smoking and  
26 Health. A name to that effect.

27 Q. Did you prepare a chart to help illustrate  
28 what he had to say about this for the jury's  
29 benefit?

30 A. Yes, I did.

31 MR. MUEHLBERGER:

32 Call up 3065, Your Honor, please.

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1 May we publish?

2 MR. RUSS HERMAN:

3 Again, no objection.

4 THE COURT:

5 You may publish.

6 EXAMINATION BY MR. MUEHLBERGER:

7 Q. What did Dr. Horn have to say about the  
8 public's knowledge of the risk of smoking?

9 A. Dr. Horn, head of the national clearinghouse  
10 for smoking and health said:

11 "You could stand on a rooftop and shout  
12 that smoking is dangerous at the top of your  
13 lungs and you would not be telling anyone  
14 anything they did not already know."

15 And he said this in 1968.

16 Q. Are statements like these typical of what  
17 other medical authorities were saying about the

18 state of public awareness regarding cigarettes?  
19 A. Yes. In fact, around this same time period,  
20 Surgeon General Stewart, at a world conference on  
21 smoking, made a similar statement that the message  
22 was getting out there and the public was adequately  
23 informed.

24 Q. Does that include Louisiana as well?

25 A. Yes. Nobody said that Louisiana was left out  
26 of the loop.

27 Q. Let me turn to another topic briefly.

28 MR. MUEHLBERGER:

29 You can take that down, Ted.

30 EXAMINATION BY MR. MUEHLBERGER:

31 Q. Can you explain the concept of ambiguous  
32 risks to the jury, please?

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1 A. Some risk, you just don't know for sure. So,  
2 if I'm flipping a coin, we know for sure that it's a  
3 50 percent chance it's a head or 50 percent chance  
4 it's a tail. That's not ambiguous risk. If I ask  
5 Mr. Muehlberger what's the chance it's going to rain  
6 tomorrow, he may say 20 percent chance. That's an  
7 ambiguous risk, because he really doesn't know that  
8 probability for sure.

9 Q. You could say that again. Have you studied  
10 how people perceive a risk when there's mixed  
11 information on a topic?

12 A. Yes, I have.

13 Q. For whom have you done this work?

14 A. I did this for the Environmental Protection  
15 Agency, and what they wanted to know is when there's  
16 a risk debate, when some scientists say the risk is  
17 high and other scientists say the risk is low, what  
18 do people make of the risk debate. So, how do they  
19 make sense out of the risk debate that's taking  
20 place.

21 Q. Have you prepared a chart to make this plain  
22 to the jury?

23 A. I have.

24 MR. MUEHLBERGER:

25 Ted, could we call up 3052, please?

26 Move to publish, Your Honor.

27 MR. RUSS HERMAN:

28 No objection to this demonstrative.

29 THE COURT:

30 You may publish.

31 EXAMINATION BY MR. MUEHLBERGER:

32 Q. Professor, could you briefly explain to the  
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1 jury what this chart demonstrates?

2 A. Well, we've got two pictures here. We've got  
3 the one on the left, St. Louis Cathedral and Jackson  
4 Square where, let's say, one scientist says the air  
5 is clean. Then, we have the picture on the right  
6 where somebody says, no, the air is polluted, it's  
7 dirty. So, there's a risk debate out there. One  
8 scientist says the risk is high. The other  
9 scientist says the risk is low. When that happens,  
10 when you have different parties doing this, when you

11 have the government saying the risk is high and, in  
12 our study, we had the polluting industry, the  
13 industry causing the pollution saying the risk is  
14 low, who do people believe, and people believe the  
15 government. They don't pay attention to the  
16 industry estimate. It's the government estimate.  
17 People gravitate toward the worst-case scenario.  
18 Q. So, it doesn't matter if this information  
19 comes from different sources?

20 A. It doesn't matter whether it's the government  
21 that says the risk is high and the industry says  
22 it's low or the industry says the risk is high and  
23 the government says it's low, so long as there's a  
24 risk debate involving two different parties, people  
25 will tend to gravitate toward the high-risk  
26 estimate.

27 Q. So, people tend to believe the bad news or at  
28 least put that in a risk assessment analysis, right?

29 A. Right. They don't simply average. They go  
30 above average toward the high-risk assessment.

31 Q. Have you prepared any articles as to how  
32 people respond to risk ambiguity?

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1 A. I have.

2 Q. Tell us what you've done in that respect?

3 A. Published more than one article, but one of  
4 them is an international economics journal called  
5 The Economic Journal, and that article was awarded  
6 the best-article-of-the-year award by the Royal  
7 Economics Society, which is an international  
8 economics society based in England.

9 Q. Have your conclusions in that article been  
10 disputed by other scholars?

11 A. No. In fact, people have found similar  
12 results.

13 Q. Okay. So, Professor, can we apply what  
14 you've just told us to the Scott class here, in  
15 Louisiana?

16 A. Yes. If you have a situation where there's a  
17 smoking risk debate, where one party said the risk  
18 is high and the other party said the risk is low,  
19 people will gravitate toward the high-risk estimate.  
20 And if you have the case that I think is probably  
21 more closely resembles this where one party says the  
22 risk is high and the other party says all the  
23 evidence is not yet in, people still tend to  
24 gravitate toward the worst-case scenario, the  
25 high-risk estimate.

26 Q. How about if one party says smoking can be  
27 highly addictive and the other says, no, it's just  
28 an habituation. Would the principle you just  
29 described apply to that concept?

30 A. Yes. People gravitate toward the high-risk.

31 Q. So, they accept the worst-case scenario?

32 A. Yes, when there's different parties, like the  
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1 government and industry.

2 Q. Let me move to another topic briefly.

3 There's been testimony in this case about a theory

4 called optimistic bias. Are you familiar with that  
5 theory?

6 A. Yes. In fact, I've studied this for the  
7 Environmental Protection Agency as well.

8 Q. Have you done research on that?

9 A. Yes. I've published on this back in the  
10 1980s and have written about it recently as well.

11 Q. Could you give the jury a sense as to what  
12 research you've published on this document?

13 A. The first thing I did was back in the 1980s  
14 regarding whether people had optimism bias with  
15 respect to household chemical risks. What I found  
16 is that if you ask people are you riskier than the  
17 average person or safer than the average, no one  
18 wants to admit that they're worse than average. So  
19 that if you ask the question that way, you can find  
20 optimism bias, or so-called optimism bias  
21 everywhere. But we then had other questions for  
22 these same people who said, yeah, I'm safer than  
23 average. Are you willing to pay more money for  
24 safer consumer products, and even though they said  
25 they were safer than average, they were willing to  
26 pay very, very large amounts for safer consumer  
27 products.

28 So, responding to these are-you-better-or-  
29 worse-than-average questions in that way doesn't  
30 necessarily mean that people are not safety  
31 conscious. It's just that basically an artifact or  
32 a consequence of how you ask the question.

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1 In fact, when I asked my students how many of  
2 them -- do you think you should get an above-average  
3 grade in this class, and they'd write it down and  
4 then submit it to me, almost every student thinks  
5 that they're above average. No one wants to say  
6 that they're below average.

7 Q. Have you found in your research that everyone  
8 thinks about risks in the same way?

9 A. No. It differs. For example, women have  
10 different risk perceptions than do men, take one  
11 example --

12 Q. Can you give the jury an example of research  
13 you've done on these individual differences?

14 A. I've done detailed analysis of how a variety  
15 of demographic characteristics, age, gender and  
16 other factors, affect risk beliefs and risk-taking  
17 behavior, and there are substantial differences  
18 across the population.

19 Q. For whom have you done this research?

20 A. This has all been done for the U.S.  
21 Environmental Protection Agency.

22 Q. Has your work on this topic been published in  
23 peer-reviewed literature?

24 A. Yes. It has been published in peer-reviewed  
25 articles and books.

26 Q. Now, if optimistic bias exists, is it going  
27 to be the same for every individual?

28 A. No. Some people will have different  
29 perceptions of the risk and they'll differ from  
30 other people.

31 Q. Okay. If someone does have optimistic bias

32 about one risk, does that mean they'll have  
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1 optimistic bias about another kind of risk?  
2 A. No. So, for example, you may think you're  
3 going to win the lottery. You may be optimistic  
4 about that. That doesn't mean you can cross the  
5 road across from the courthouse without looking for  
6 cars and not getting run over.

7 Q. Okay. As we found out this morning. People  
8 could be optimistic about some risks then and not  
9 about others; is that right?

10 A. That's right.

11 Q. Now, Professor, how can we find out whether  
12 people are optimistic about smoking?

13 A. Well, one way is to ask them.

14 Q. Have you done that?

15 A. I've looked at evidence from the Gallup  
16 Polls, and the Gallup Polls indicate that roughly  
17 two- thirds of all smokers believe that smoking has  
18 already affected their health. More recent Gallup  
19 Poll evidence indicate that's most smokers believe  
20 that smoking will eventually affect their health  
21 adversely.

22 Q. Have you prepared a chart to demonstrate that  
23 to help the jury understand this concept?

24 A. Yes, for the second set of results.

25 MR. MUEHLBERGER:

26 Ted, could you pull up 3062, please?

27 Move to publish, Your Honor.

28 THE COURT:

29 Any objection?

30 MR. RUSS HERMAN:

31 I just need one minute, Your Honor.

32 No problem. We have no objection.

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1 THE COURT:  
2 You may publish.  
3 MR. MUEHLBERGER:  
4 Thank you, Your Honor.

5 EXAMINATION BY MR. MUEHLBERGER:

6 Q. Professor, could you walk the jury through  
7 this and what it shows?

8 A. Well, the question is how likely do you think  
9 it is that you will have serious health problems  
10 from smoking if you continue to smoke? What we find  
11 is that 78 percent of smokers think it's likely or  
12 very likely that they'll have serious health  
13 problems from smoking if they continue to smoke.

14 Q. And how does that demonstrate this optimistic  
15 bias theory or not?

16 A. People know that smoking is risky to them,  
17 so, there is a risk to themselves. There's no  
18 evidence of this optimism bias hypothesis here.

19 Q. Okay. Now, Dr. Arnett, when he was here,  
20 talked about instances where people said they're  
21 going to quit, but they didn't quit smoking. Have  
22 you looked at that issue?

23 A. I have.

24 Q. And what have you found on that subject?

25 A. What people say on that issue is not what  
26 they always mean. So, there's one study I examined  
27 in which hundreds of parents were offered the  
28 opportunity to participate in a smoking-cessation  
29 clinic. And they're asked, well, if the clinic was  
30 available, would you use it, and close to half of  
31 them said sure. You know, I'd like to quit smoking,  
32 I'll take advantage of the clinic. But the clinic  
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1 was actually made available to them and it turns out  
2 that very, very few of them, something like 3  
3 percent, actually attended the clinic when it was  
4 available. So, even though they say they want to  
5 quit smoking, when it comes to actually following  
6 through, even though they were offered the smoking-  
7 cessation clinic, hardly any of them did.

8 Q. Professor, in your opinion, is there any  
9 credible evidence that adults exhibit optimistic  
10 bias towards smoking?

11 A. No. There's no evidence of that.

12 Q. Professor, in your opinion, is there any  
13 credible evidence that young people exhibit  
14 optimistic bias towards smoking?

15 A. No. In fact, you find the opposite.

16 Q. Now, even with all this information out there  
17 and the beliefs you've just told us about smoking,  
18 if a smoker, an individual smoker still believes  
19 he's going to be the lucky one and not get a  
20 smoking-related disease, in your opinion, is there  
21 anything any one person or a company can do to  
22 convince that person that he's not going -- not  
23 going to be the lucky one that's not going to get  
24 the smoking-related disease?

25 A. No. If people are consistently irrational  
26 once they've gotten the information, then, there's  
27 nothing you can do to fix this.

28 Q. Let me turn to another topic, Professor.  
29 There's been testimony in this case discussing the  
30 concept of nicotine addiction. Is addiction  
31 something an economist can study?

32 A. Yes. There's an economic literature on the  
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1 economics of addiction. We don't pretend to be  
2 medical experts. We approach addiction from an  
3 economics standpoint.

4 Q. You are not here to talk about medical  
5 diagnosis of addition, right?

6 A. That's correct.

7 Q. Have economists published studies relating to  
8 addiction?

9 A. Yes, they have. In fact, chapters out of two  
10 of my books deal with cigarette addiction from an  
11 economic standpoint.

12 Q. And what do those studies show?

13 A. The popular notion of what cigarette  
14 addiction is is that people are locked into smoking  
15 and they can't change. So, is that really true?  
16 What we find is that people are, first of all, very  
17 responsive to changes in the price of cigarettes.

18 So, as the price of cigarettes goes up, people buy  
19 fewer cigarettes. In fact, people are roughly as  
20 responsive to increases in the price of cigarettes  
21 as they are to increases in the price of other  
22 things that they buy at the store.

23 The second set of results has to do with  
24 smoking restrictions. As smoking restrictions are  
25 imposed on a workplace or a hospital, people don't  
26 have a target number of cigarettes that they have to  
27 smoke that day. So, they're not locked into smoking  
28 their 20 or 30 cigarettes a day. They actually cut  
29 back the amount of cigarettes they smoke. So that  
30 people respond to both money prices of cigarettes as  
31 well as smoking restrictions, and they cut back when  
32 the cost of cigarette smoking goes up.

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1 Q. Okay. So, you're saying that if the price of  
2 cigarettes goes up, that smokers respond to that  
3 price increase like they do for other consumer  
4 goods?

5 A. Yes. In fact, there are dozens of studies  
6 that document this. So, for example, a 10 percent  
7 increase in the price of cigarettes will lead people  
8 to cut back anywhere from 4 to 10 percent in terms  
9 of the amount of cigarettes they smoke.

10 Q. If smokers had no choice as to whether to  
11 smoke, would you expect this reaction to increased  
12 prices of cigarettes to smokers decreasing their  
13 smoking?

14 A. No. If smokers were locked in to smoking a  
15 particular number of cigarettes, you know, boosting  
16 the price a little bit wouldn't affect their smoking  
17 behavior. We feel that people are actually quite  
18 price responsive.

19 Q. Now, do other scholars agree with you on  
20 this?

21 A. Yes. Dozens of scholars agree with me on  
22 this, including Dr. Cummings, who's testified here,  
23 as well as various antismoking advocates who've  
24 advocated higher cigarette taxes as a way to cut  
25 back on smoking, and the mechanism there is higher  
26 prices reduce smoking.

27 Q. As an economist, do you consider consumers'  
28 reaction to increased cigarette prices to be a  
29 rational reaction?

30 A. Yes. This is the way people should respond.  
31 If the price of something goes up, you buy less of  
32 it. This is exactly the same kind of behavior we

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1 observed with smokers. When the price of cigarettes  
2 go up, they buy fewer cigarettes.

3 Q. You also said when smoking restrictions go  
4 into place, for instance, at one's workplace, the  
5 literature and studies you've looked at also  
6 indicate that people respond to those restrictions;  
7 is that right?

8 A. That's right. Many of those studies indicate  
9 that people cut back their smoking 10 to 15 percent  
10 when smoking restrictions go into place.

11 Q. Now, Professor, are you here to tell the jury  
12 that for every smoker out there, it's easy to quit  
13 smoking?

14 A. No. For some people, it's very, very  
15 difficult.

16 Q. Have you reviewed the literature on smoking  
17 addiction? Do you consider smoking cigarettes so  
18 addictive that smokers are incapable of making a  
19 rational choice to quit?

20 MR. RUSS HERMAN:

21 Objection, Your Honor. Calls for a  
22 medical opinion.

23 MR. MUEHLBERGER:

24 Not from an economic --

25 MR. RUSS HERMAN:

26 Wait a minute, Counselor. I only made  
27 one objection.

28 MR. GAY:

29 Objection, Your Honor.

30 THE COURT:

31 The objection is overruled.

32 Doctor, but you're not authorized to

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1 give a medical opinion. If you can answer it  
2 within the realm of your expertise, you may  
3 answer it.

4 THE WITNESS:

5 Thank you, Your Honor.

6 A. From an economic standpoint, people have  
7 every sense of balancing benefits and costs in terms  
8 of their decision. So, I've shown in my analysis as  
9 people's risk beliefs regarding smoking go up, they  
10 are less likely to smoke. As prices of cigarettes  
11 go up, they cut back on their cigarettes. As  
12 smoking restrictions are imposed, they cut back on  
13 their smoking. So, all of this is consistent with  
14 the rational balancing of the benefits and costs,  
15 doing their own personal risk utility tests with  
16 regard to smoking.

17 MR. MUEHLBERGER:

18 Thank you very much, Professor. That's  
19 all I have.

20 MR. RUSS HERMAN:

21 I have a few questions for you,  
22 Professor.

23 THE COURT:

24 We're going to take our mid-morning  
25 recess at this point. We will begin with the  
26 cross-examination of the witness after that  
27 recess. We'll recess until quarter to 11:00  
28 by the wall clock.

29 (Jury excused.)

30 THE COURT:

31 Let the record reflect the jury has left  
32 the courtroom.

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1 Anything for the record by Plaintiff  
2 Counsel?

3 MR. RUSS HERMAN:

4 No, Your Honor.  
5 THE COURT:  
6 Defense Counsel, anything for the  
7 record?  
8 MR. WITTMANN:  
9 No, Your Honor.  
10 THE COURT:  
11 All right. We'll recess.  
12 (Whereupon, a brief recess is taken.)  
13 (Jury seated.)  
14 THE LAW CLERK:  
15 All rise. Recess is over. Court will  
16 come to order.  
17 THE COURT:  
18 Please be seated.  
19 Cross-examination by plaintiff's  
20 counsel?  
21 MR. RUSS HERMAN:  
22 Yes, Your Honor.  
23 THE COURT:  
24 You may proceed, Mr. Herman.  
25 MR. RUSS HERMAN:  
26 Morning, Your Honor. Morning, ladies  
27 and gentlemen of the jury. And morning,  
28 Professor.  
29 THE WITNESS:  
30 Morning, Mr. Herman.  
31 CROSS-EXAMINATION BY MR. RUSS HERMAN:  
32 Q. Do you realize you are the only witness to  
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1 testify in this trial so far that didn't offer one  
2 document in evidence?

3 A. No, I've not read other testimony.

4 Q. I notice that you put some demonstrations up,  
5 but the material supporting your testimony was never  
6 offered in evidence, was it?

7 A. I don't understand -- is that a legal  
8 question?

9 Q. No, sir. I mean, that's a plain, simple  
10 question, sir.

11 A. My books were never offered in evidence or --

12 Q. Well, you put a bunch of demonstratives up,  
13 but you never offered the surveys, did you? You  
14 never put them in evidence, did you?

15 A. Whatever -- I don't know what my lawyer did.

16 So --

17 Q. Ah. Ah. We'll get to what -- I'll ask you  
18 about those questions later. Let's just put up one  
19 of the things you offered and take a look at it and  
20 maybe you can explain some things. Gallup Polls.  
21 Let's put up, for example, DDA-3072.

22 MR. RUSS HERMAN:

23 Can we display that? It was displayed  
24 by the defendants. It's their exhibit.

25 MR. MUEHLBERGER:

26 We did not use this demonstrative.

27 MR. RUSS HERMAN:

28 Oh, you didn't use that one. What about  
29 DDA-3059? 3059. I believe you used that  
30 one.

31 May I publish, Your Honor?

1 Yes.  
2 EXAMINATION BY MR. RUSS HERMAN:

3 Q. Did you have any help preparing this by your  
4 lawyers?  
5 A. I gave them the numbers and their people  
6 turned it into a bar chart.

7 Q. The lawyers' people turned this exhibit for  
8 this jury into a bar chart, correct?

9 A. The graphics people did the colorful things.  
10 I've already done bar charts myself in my book, but  
11 they turned it into a color overhead.

12 Q. Sir, that's not my question. You gave this  
13 to the lawyers and they produced this chart; isn't  
14 that true? Isn't that true?

15 A. I gave them all the information and they  
16 turned it into a chart, yes.

17 Q. Great. Now, do you see the question: "What  
18 Do People Believe About Lost Life Expectancy"?

19 A. Yes.

20 Q. Isn't that misleading, sir?

21 A. Not to me. I explained to the jury what all  
22 these questions meant.

23 Q. Well, isn't there a survey specifically in  
24 Louisiana that came out very recently that shows  
25 that children 11 to 15 in Louisiana, in grades five,  
26 six, seven and eight, are cigarette smokers, double  
27 the amount across this country? Isn't that true?

28 A. I haven't seen the study, but it has nothing  
29 to do with beliefs about life expectancy as you've  
30 described them, Mr. Herman.

31 Q. Well, why doesn't you chart say what do  
32 children believe about lost life expectancy?

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1 A. Children were not in these samples.

2 Q. Oh, you didn't sample children. But I  
3 thought when we were here last, you agreed with me  
4 that the average age that someone begins to smoke is  
5 around 14 years old. Didn't you agree with that  
6 last time we were here?

7 A. I didn't -- if you're talking about smoking  
8 on a continuous basis, I never agreed. You cited  
9 some statistics and I had no reason to disagree  
10 since I had no independent statistics on that issue.

11 Q. And you actually didn't put the underlying  
12 evidence that supports this chart in evidence.  
13 Wouldn't it be better to say, and more honest to  
14 say: "What do people over the age of 18 believe  
15 about lost life expectancy"? Wouldn't that have  
16 been a more honest thing to say, sir, on that chart?

17 A. There is nothing dishonest about this. I've  
18 always characterized my charts accurately.

19 Q. Yes. It could be a whole cup. This looks  
20 like a whole cup, or it could be a half a cup. One  
21 can hold water, one can't; isn't that true?

22 A. That doesn't look like it'll hold much water,  
23 Mr. Herman.

24 Q. Let's talk about optimism. Are there people

25 that say that this cup of water is half full and  
26 other people that say that it's half empty? Just  
27 use some common sense. Isn't that true? Don't you  
28 know that?

29 A. This cup's going to leak all the water, Mr.  
30 Herman. It's got a hole in it.

31 Q. No. This cup, like that chart, is going to  
32 leak a big thing.

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1 A. Right.

2 Q. This cup has got water in it. Don't you  
3 agree some people will look at this cup and say,  
4 it's either half full or half empty?

5 A. Both are symmetric, yes.

6 Q. Yes, sir. Some of optimistic and some of  
7 pessimistic. That's what our common sense tells us;  
8 isn't that true?

9 A. Saying a glass is half full or half empty has  
10 nothing to do with op optimism bias, hypothesis with  
11 respect to risk.

12 Q. I'm a common sense fellow. University of  
13 Virginia, a good university?

14 A. Yes, it is.

15 Q. Tough requirements to get in, and their  
16 graduates are well respected, aren't they?

17 A. I'm not sure all of them are well respected.

18 Q. Well, generally speaking --

19 A. I can't name that many Virginia graduates.

20 Q. Well, I can name one. Aaron Brooks. Do you  
21 know who Aaron Brooks is, sir?

22 A. No.

23 Q. He's the Saints quarterback. He said he  
24 never expected, a headline, ever to get injured  
25 playing pro football. Now, there's a man, educated,  
26 University of Virginia, a graduate, highly skilled,  
27 never in his own mind believed that he would get  
28 hurt. You don't call that optimistic bias?

29 A. The way the quotation I read, "I did not  
30 expect to be injured" could be interpreted he did  
31 not think there was a greater than a 50 percent  
32 chance that he would be injured.

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1 Q. Sir, is that optimistic for a pro quarterback  
2 who's getting pounded?

3 A. He's never been injured yet. He's played in  
4 lots of games in his life without injury. So, he  
5 doesn't expect to be injured.

6 Q. I guess, sir, you don't know he was injured  
7 and played injured the last four games of the season  
8 and had to undergo surgery. You don't know that, do  
9 you?

10 A. I do know he was injured, yes.

11 Q. Let me put up another one of these charts.  
12 It doesn't make any difference to me which one. It  
13 was one you used. I thought it was DDA-3058. Let's  
14 put up your demonstrative that your lawyers made,  
15 3058.

16 MR. RUSS HERMAN:  
17 May I publish, Your Honor?

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1 Q. And Shook, Hardy also paid for some of these  
2 surveys based -- that this chart's based on,  
3 correct?  
4 A. Shook, Hardy was part of the '85 one as well,  
5 yes.  
6 Q. Well, look at 1985. Now, the evidence isn't  
7 before the jury, just this chart, and that's the  
8 only one of these four in which people under 18 were  
9 surveyed and they began at age 16; is that correct?  
10 A. That's correct.  
11 Q. How many 16-year-olds? Can you tell from the  
12 survey?  
13 A. No, because you just have the age range  
14 response.  
15 Q. Yeah. You don't know whether there were  
16 three 16-year-olds or 1,000 because you don't have  
17 the underlying data to show how many 16-year-olds or  
18 17-year-olds were surveyed; isn't that correct?  
19 A. I have the data on the number of people 16 to  
20 21. So, I can tell you it's not 1,000.  
21 Q. Sir --  
22 MR. GAY:  
23 Objection. Objection.  
24 EXAMINATION BY MR. RUSS HERMAN:  
25 Q. Answer my question, please.  
26 THE COURT:  
27 Approach the bench, gentlemen.  
28 (Whereupon, a sidebar conference is  
29 held as follows:)  
30 THE COURT:  
31 Your objection, Mr. Gay.  
32 MR. GAY:

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1                   The witness is in the middle of his  
2                   answer and Mr. Herman is interrupting.  
3                   That's the objection.  
4                   THE COURT:  
5                   I think that is probably correct. Let  
6                   him finish his answer, Russ, and you've been  
7                   asking what I consider to be bordering on  
8                   compound questions. Single questions and let  
9                   him finish his answer.  
10                  MR. RUSS HERMAN:

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1 So, it would not be three.  
2

3 EXAMINATION BY MR. RUSS HERMAN:  
4

5 Q. Sir, how many 16-year-olds were surveyed in  
6 1985?  
7

8 A. I can't give you an exact count.  
9

10 Q. Thank you.  
11

12 In 1991, you did that survey, correct.  
13

14 A. I did.  
15

16 Q. How many 11, 12, 13, 14, 15, 16 and  
17 17-year-olds were surveyed?  
18

19 A. None, because I made the age cutoff 18.  
20

21 Q. So, you didn't survey, again, you did not  
22 survey a youth in the 1991 survey you did, correct?  
23

24 A. That's correct.  
25

26 Q. And, as a matter of fact, you destroyed or  
27 threw out the underlying documentation for that  
28 survey; isn't that true?  
29

30 A. Well, I published the results of the survey,  
31 and when I moved to Harvard, I did not save all of  
32 the coding sheets where we wrote down all the  
33 answers because I was cleaning up my office and I  
34 can't bring everything with me. But I still have  
35 representative coding sheets and I have published  
36 the results of the survey in the same way that  
37 Gallup publishes their results. So, just the way  
38 they've published results, I've peer-reviewed  
39 published results of the survey.  
40

41 Q. Is that a "Yes" or a "No"?

42 A. I don't have the coding sheets.  
43

44 Q. You threw them out?  
45

46 A. When I cleaned up my office, I did. I moved.  
47 Nobody requested them after several years. I tossed  
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4 that they were prepared, these surveys were prepared  
5 in the anticipation of lawsuits and for purposes of  
6 lawsuits, didn't you?

7 A. My survey had nothing whatsoever to do with  
8 either the industry or preparation for a lawsuit.  
9 It was prepared without the industry's knowledge  
10 and, at the time, I was not being retained on any  
11 tobacco matters. That happened after I moved to  
12 Harvard.

13 Q. Sir, haven't you testified before that your  
14 1991 survey was so that you could validate the 1985  
15 survey prepared for litigation?

16 A. Yes, but I did that on my own, and my  
17 validation had nothing to do with work for the  
18 tobacco industry. It was undertaken without their  
19 knowledge and without their financial support.

20 Q. And you threw out the underlying data when  
21 you moved to Harvard?

22 A. After several years after publishing the  
23 results, nobody asked for it. I didn't keep it.

24 Q. 1997, was that survey prepared and financed  
25 by the tobacco/cigarette industry?

26 A. It was paid for by law firms representing the  
27 industry.

28 Q. Law firms that are representing one or  
29 more -- one or more law firms that are representing  
30 tobacco in this case?

31 MR. GAY:

32 Objection, Your Honor.

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1 THE COURT:

2 Approach the bench.

3 (Whereupon, a sidebar conference is held  
4 as follows:)

5 THE COURT:

6 I make the observation that we were  
7 talking about one lawyer per witness per  
8 side, and Muehlberger did the direct and  
9 you're doing the objecting on cross. Does  
10 anybody think that violates our ground rules?

11 MR. GAY:

12 I don't think it does, Your Honor.

13 THE COURT:

14 So, you're going to be the only defense  
15 counsel objecting?

16 MR. GAY:

17 No. I think I'm just objecting for  
18 Philip Morris. I'm objecting to the -- on  
19 the grounds of what we talked about last  
20 week, going in and trying to finger-point the  
21 words in this courtroom.

22 MR. RUSS HERMAN:

23 I'm testing the evidence. I'm sure  
24 they've got a right to know who paid for  
25 surveys.

26 THE COURT:

27 The objection is overruled.

28 (End of sidebar.)

29 THE COURT:

30 The objection is overruled.

31 Answer the question, please, Doctor.

32 A. I know Arnold & Porter was one of the law  
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1 firms that paid for it. I don't know if Arnold &  
2 Porter is in this room.

3 EXAMINATION BY MR. RUSS HERMAN:

4 Q. Well, I have a copy of the survey. Would you  
5 like to see it?

6 A. That would help.

7 MR. RUSS HERMAN:

8 I need the other box of their documents,  
9 please.

10 We're going to come back to the question  
11 because I don't want to delay this, and then  
12 I'll show you the '97 survey.

13 EXAMINATION BY MR. RUSS HERMAN:

14 Q. '98, is that a survey prepared by the --  
15 paid for, rather, by the tobacco industry, the  
16 cigarette industry?

17 A. It was paid for by law firms representing  
18 them, yes.

19 Q. For litigation purposes, yes?

20 A. For the Massachusetts A. G. case, yes.

21 Q. That was a lawsuit, was it not?

22 A. That's right.

23 Q. Okay. So, all three of the surveys that this  
24 chart's based on, the '85, the '97 and '98, were  
25 paid by law firms for litigation or lawsuit  
26 purposes, correct?

27 A. Those three surveys were, yes.

28 Q. And '91, '97, '98 don't have any questions  
29 directed at youth; isn't that correct?

30 A. No one under the age of 18 was in the sample.

31 Q. All right. Let me ask you a question: You  
32 didn't, in any of these surveys, say what do you

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1 believe will happen to you if you continue smoking;  
2 isn't that correct?

3 A. That survey question wasn't there because I  
4 believed that the question as I've worded it is a  
5 better way to ask the question.

6 Q. You don't know what people felt their risk  
7 was individually because you never asked the  
8 question; isn't that correct?

9 A. No. The format of the question, when you ask  
10 people what's the risk out of 100 smokers, is the  
11 general approach I use in my studies for EPA. You  
12 ask the people what's the risk to a reference  
13 population, and you can show this is actually  
14 pertinent to what they think the risks. I've run  
15 tests with these data showing the higher their  
16 responses to that question, the less likely they are  
17 to smoke. So, it does affect whether they smoke or  
18 not.

19 Q. There were only four to six questions in the  
20 '97, '98 survey; isn't that correct?

21 A. No.

22 Q. How many questions were there?

23 A. '97, '98 had detailed questions on  
24 demographic characteristics, like computer usage and

25 so on.  
26 Q. Sir, there were only four to six questions  
27 about cigarette smoking in the 1997 survey; isn't  
28 that correct?  
29 A. Well, that's a different question than you  
30 just asked.  
31 Q. Yes, sir. I'm sorry, and I stand corrected.  
32 A. Yes. There were only, basically, a handful  
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1 of questions about cigarette smoking.  
2 Q. And they were done over the telephone; isn't  
3 that correct?  
4 A. Yes, these were telephone interviews.  
5 Q. You didn't have any individuals from a  
6 community sit down and answer 25 pages of questions  
7 about their background and what they knew about  
8 cigarette smoking, did you?  
9 A. No. This is a telephone survey.  
10 Q. You didn't have them examined by a court of  
11 law or lawyers as to the answers, did you?  
12 A. That's not the way surveys are done. They  
13 are run by survey people, not by courts and lawyers.  
14 Q. I see. So, you asked four to six questions  
15 over the telephone, and none of them were directed  
16 to youth, correct?  
17 A. In the '91 through '98 surveys, you had to be  
18 age 18. 1985, you had to be age 16.

19 Q. Let me get back, because I certainly don't  
20 want to leave a question unanswered that I said I  
21 would ask. I'd like you to look at the cigarette  
22 companies' exhibits SA-2534, dated --

23 MR. RUSS HERMAN:  
24 Would you put that back up, please --  
25 EXAMINATION BY MR. RUSS HERMAN:  
26 Q. Dated 1985. Read off the names of the law  
27 firms that are on that exhibit.  
28 A. Arnold & Porter, Jones, Day, Reavis and  
29 Pogue, and Shook, Hardy and Bacon.  
30 Q. I'm going to show you -- Jones, Day and  
31 Shook, Hardy, you know, are in this case, correct?  
32 A. I believe both of them are. I know Shook,  
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1 Hardy is.  
2 Q. When I asked you about 1997, what the law  
3 firms were, you weren't sure. So, I'm going to hand  
4 you the '97 survey. Is the Jones, Day law firm  
5 listed on the face of that survey?  
6 A. Right. There's two this time instead of  
7 three. Arnold & Porter and Jones, Day.  
8 Q. And Jones, Day is also representing cigarette  
9 companies in this case, correct?  
10 A. Yes.

11 MR. RUSS HERMAN:  
12 Now, let's take that chart down.  
13 EXAMINATION BY MR. RUSS HERMAN:  
14 Q. Let's talk about, evidently, what no one from  
15 these cigarette companies who have brought you here  
16 told you about.  
17 MR. WITTMANN:

18 Objection, Your Honor. May we approach?  
19 THE COURT:  
20 You may approach  
21 (Whereupon, a sidebar conference is held  
22 as follows: )

23 MR. WITTMANN:  
24 Your Honor, Mr. Herman has a way of  
25 making a speech before asking a question. I  
26 would ask that he not make those speeches;  
27 simply ask a question.

28 MR. RUSS HERMAN:  
29 I'm making a transition, the same way  
30 Mr. Muehlenberg and you have done as to what  
31 the next subject's going to be.

32 THE COURT:  
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1 I understand, but you did make a factual  
2 statement, and that's inappropriate as a  
3 transitional tool.

4 The objection's sustained.  
5 Next question, please.  
6 (End of sidebar.)

7 EXAMINATION BY MR. RUSS HERMAN:

8 Q. Did Philip Morris and their attorneys in this  
9 case provide you with the following survey before  
10 you came here to testify, the Roper survey of  
11 August, 1953, which surveys children age 13 to 18?

12 A. I don't recall seeing it, but if you showed  
13 it to me, I might be able to see if I've seen it or  
14 not.

15 Q. Well, the reason -- sir, did you not testify  
16 when you were here before Easter that you had not  
17 looked at any of the exhibits in this case?

18 A. I had not made a special mission of looking  
19 at exhibits in this case. I've seen lots of things  
20 dealing with tobacco. I don't know what's been an  
21 exhibit and what hasn't.

22 Q. Sir, didn't you make the statement when you  
23 were last here that you had not reviewed the  
24 exhibits in this case?

25 A. I stand by my answer. I've not made a  
26 special project of looking at exhibits, but I've  
27 read lots of things about tobacco over the past  
28 years, and some could have been exhibits in the  
29 case.

30 Q. In the last eight or nine days, have you  
31 undertaken a review of the exhibits which have been  
32 offered in evidence to this jury?

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1 A. No, not a detailed review.

2 Q. Well, sir, what is a detailed review as  
3 contrasted with a review?

4 A. I may have seen some documents that happened  
5 to have been exhibits. I don't know if the things  
6 that I've seen in my work on this case are exhibits  
7 or not exhibits.

8 Q. Let's just talk about the last eight days.  
9 Did you review any surveys that Philip Morris or one  
10 of these lawyers handed you that was done in 1953 on

11 13-year-olds?  
12 A. I've looked at a 1953 Roper survey.  
13 Q. In the last eight days?  
14 A. Yes. I may have seen it before as well.  
15 Q. Was that survey 13-, 14-, 15- and 16-  
16 year-olds?  
17 A. I don't recall the exact age group, but it  
18 did include people under the age of 18.  
19 Q. All right. Now, did Philip Morris or any of  
20 its lawyers since you were here last give you the  
21 Roper survey done in 1974 that surveyed individuals  
22 age 14 or less?  
23 A. I don't recall that one.  
24 Q. Did Philip Morris or any of its lawyers  
25 provide you with a document, Exhibit 3523, dated  
26 March 29, 1979, that Marlboro dominates the 17 and  
27 under market.

28 MR. WITTMANN:  
29 Objection, Your Honor. May we approach?  
30 THE COURT:  
31 Yes.  
32 (Whereupon, a sidebar conference is held  
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1 as follows:)  
2 MR. WITTMANN:  
3 Mr. Herman is referring to documents not  
4 in evidence, characterizing what they say.  
5 MR. RUSS HERMAN:  
6 They're all in evidence. I've got the  
7 dates they were in evidence.  
8 MR. WITTMANN:  
9 They may be, but his characterization of  
10 what a document says or doesn't say, I think,  
11 is improper examination.  
12 MR. RUSS HERMAN:  
13 All I'm doing is asking him if he's seen  
14 it.  
15 THE COURT:  
16 You've tendered the documents in  
17 evidence?  
18 MR. RUSS HERMAN:  
19 Yes, they're all there.  
20 MR. WITTMANN:  
21 As far as his characterization as to  
22 what the document is, I think, is improper.  
23 If he has a question about a document, the  
24 witness ought to be able to see the document  
25 instead of having to accept Mr. Herman's  
26 statement as to what it is.

27 THE COURT:  
28 I think that's coming. I think that  
29 would be a better way to approach it.  
30 Overruled.

31 MR. MUEHLBERGER:  
32 I don't think this document he is  
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1 referring to is on the cross exhibit list. I  
2 couldn't find it.  
3 MR. RUSS HERMAN:

4 It's Exhibit 3523.  
5 (End of sidebar.)  
6 EXAMINATION BY MR. RUSS HERMAN:  
7 Q. With reference to Exhibit Number 34 -- I'm  
8 sorry -- 0451.02 by R.J. Reynolds, dated September  
9 30th, 1974, admitted in evidence in this case on  
10 February 27th, 2003, a survey of individuals 14 to  
11 24 years old called young adults. Were you provided  
12 with that survey?

13 A. I don't recall seeing that survey.

14 Q. Exhibit 3430, admitted in evidence on  
15 February 16th of '03, Philip Morris document dated  
16 5/21/75, a survey of 15- to 19-year-olds, were you  
17 given that document?

18 A. I don't know what's in that document, but I  
19 have not received that as part of this case.

20 Q. What about Exhibit 2891.01, admitted in  
21 evidence on February 13th, 2003, dated October, '81,  
22 a Lorillard survey regarding Newport and smoking  
23 habits of 10- to 13-year-olds and 14- to  
24 17-year-olds. Were you given that document?

25 A. I don't think I've seen that one either.

26 Q. Now, there have been a number of letters that  
27 cigarette companies sent to fourth-, fifth- and  
28 sixth-grade classes.

29 MR. MUEHLBERGER:

30 Objection.

31 EXAMINATION BY MR. RUSS HERMAN:

32 Q. Have you seen those letters, sir?

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1 MR. MUEHLBERGER:  
2 Objection. May we approach?  
3 THE COURT:  
4 You may approach.  
5 (Whereupon, a sidebar conference is held  
6 as follows:)  
7 THE COURT:  
8 Mr. Muehlberger?  
9 MR. MUEHLBERGER:  
10 Mr. Herman said cigarette companies sent  
11 letters to third-, fourth-, fifth-, sixth-  
12 graders. Lorillard never sent such  
13 communications, and I object.

14 THE COURT:  
15 As I recall, the letters were sent to  
16 the schools or the teachers, not to the  
17 children, Mr. Herman. I think you need to be  
18 very specific and very precise.

19 MR. RUSS HERMAN:  
20 Okay. I will do that.

21 THE COURT:  
22 Does your recollection agree with mine?

23 MR. RUSS HERMAN:  
24 No, sir. Actually, the responses were  
25 we are responding to your second-grade class  
26 or fourth-grade class that made an inquiry,  
27 and this is our response. Please advise your  
28 kids.

29 THE COURT:  
30 I think, technically, they were  
31 addressed to the teacher or to the school.

MR. RUSS HERMAN:  
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1 All right. I will withdraw and restate  
2 it.

3 MR. WITTMANN:

4 The other thing is Mr. Herman continues  
5 to characterize the document in a way he  
6 wants to characterize it, which is not what  
7 the document is. He keeps referring to  
8 surveys of 14-year-olds. There's no  
9 marketing survey that we used that didn't  
10 survey 14-year-olds.

11 THE COURT:

12 Isn't that what redirect is going to be  
13 for?

14 MR. WITTMANN:

15 I suppose. I continue to object to his  
16 characterization -- mischaracterization.

17 THE COURT:

18 Noted and overruled.

19 Don't mischaracterize exhibits, Mr.  
20 Herman.

21 (End of sidebar.)

22 EXAMINATION BY MR. RUSS HERMAN:

23 Q. Sir, have you seen the document written to  
24 the second-grade teacher on June 6th, 1972, in which  
25 the cigarette companies indicate that there is --  
well, have you seen the letter?

26 A. No.

27 Q. Have you seen the letter admitted in evidence  
28 on February 7th, 2003, dated 5/1/1963 to a fourth-  
29 grade class teacher in Tacoma about cigarette  
30 smoking and the health issue?

31 A. No.

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1 Q. Have you seen the document 02373.01 written  
2 to a fifth-grade teacher in Santa Monica,  
3 California, on 4/7/72 regarding the cigarette  
4 companies' position on health and smoking?

5 A. No.

6 Q. Have you seen the August -- excuse me -- the  
7 January 11th, 1980, letter written to a fifth-grade  
8 class teacher in am Hurst, New York, which was  
9 admitted in evidence as Exhibit 4858, February 27th,  
10 '03?

11 A. No.

12 Q. So, I take it you have not seen any of the  
13 direct evidence before this jury as to what position  
14 the cigarette companies took --

15 MR. GAY:

16 Objection.

17 THE COURT:

18 Let's have the question asked and then  
19 I'll entertain your objection, please, so  
20 I'll be able to rule on the entire question.

21 Ask the question, please, Mr. Herman.

22 MR. RUSS HERMAN:

23 Sure.

24 EXAMINATION BY MR. RUSS HERMAN:

25 Q. You have not been presented the evidence as  
26 to the position the cigarette companies took from  
27 1963 to 1980 in writing grammar school teachers  
28 about the evidence as to smoking and health; is that  
29 correct?

30 MR. GAY:  
31 Objection, Your Honor.  
32 MR. MUEHLBERGER:

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1 Objection.  
2 THE COURT:  
3 Approach the bench, please.  
4 (Whereupon, a sidebar conference is held  
5 as follows:)  
6 THE COURT:  
7 Either one of you can be first.  
8 MR. GAY:  
9 Mr. Herman is mischaracterizing this  
10 evidence. It is -- Philip Morris never wrote  
11 any of these letters, and he's using this to  
12 say the companies did this, and it's  
13 improper.

14 THE COURT:  
15 Let me check the question.  
16 Are any of those letters written by or  
17 on behalf of Philip Morris?

18 MR. RUSS HERMAN:  
19 One is written on behalf of all the  
20 companies by someone who was with the Tobacco  
21 Institute. This was written by R.J.  
22 Reynolds.

23 MR. MUEHLBERGER:  
24 This is what he just asked about, not  
25 written by Lorillard.

26 MR. GAY:  
27 And I object to the --  
28 MR. WILLIAMS:  
29 I object to the question on behalf of  
30 Brown & Williamson on the same grounds Mr.  
31 Gay articulated.

32 THE COURT:  
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1 I think the question needs to be  
2 specific as to these defendants, Mr. Herman.  
3 So, I'll sustain the objection to the  
4 question.

5 MR. RUSS HERMAN:  
6 Okay.  
7 THE COURT:  
8 Just a moment.  
9 MR. GAY:  
10 He keeps doing it, Judge. The proper  
11 method is if you want the witness to deal  
12 with the document, you have to deal with the  
13 document. You just can't make up things  
14 about the document in your answer and ask the  
15 witness if he's seen it.

16 THE COURT:  
17 I've instructed Mr. Herman to be very

18 specific with his question. I've heard the  
19 objection to the question. Instruct the  
20 witness not to answer it, the jury to  
21 disregard the question.

22 You may ask another question.

23 MR. RUSS HERMAN:

24 Thank you, Your Honor.

25 (End of sidebar.)

26 THE COURT:

27 The objection is sustained.

28 Don't answer the question.

29 The jury will disregard the question.

30 Next question, Mr. Herman.

31 EXAMINATION BY MR. RUSS HERMAN:

32 Q. I'm going to show you Exhibit 4858, admitted  
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1 in evidence on 2/27/2003, dated January 11th, 1990.

2 MR. RUSS HERMAN:

3 Your Honor, I'd like it put on the  
4 screen for yourself and Counsel. It's been  
5 already admitted in evidence, Your Honor.  
6 It's an R. J. Reynolds document from 1990.

7 May we publish?

8 THE COURT:

9 No objection, you may publish.

10 MR. RUSS HERMAN:

11 Carl, would you put up the first page?

12 Thank you.

13 Would you please highlight where it says  
14 R.J. Reynolds and the date? Can you enlarge  
15 that for us? Would you go back to the first  
16 page and highlight where it says "Principal."  
17 Would you enlarge that? Okay. Now, would  
18 you please go to the first paragraph, where  
19 it says what grade of student this letter is  
20 written to. All right. Now, would you go  
21 to -- if you'll excuse me, Dr. Viscusi.  
22 Would you please, Carl, go to the last  
23 paragraph on that page and blow it up as  
24 large as you can?

25 MR. GAY:

26 Objection.

27 THE COURT:

28 Approach the bench.

29 (Whereupon, a sidebar conference is held  
30 as follows: )

31 THE COURT:

32 Mr. Gay?

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1 MR. GAY:

2 Your Honor, Mr. Herman has yet to show  
3 that this witness knows anything about this  
4 document. So, he puts up a paragraph that  
5 has to do with names of the company on toys.  
6 The very next paragraph explains the  
7 company's position. He ignores that and goes  
8 to some other paragraph. This is improper  
9 use of an exhibit with a witness who knows  
10 nothing about it for some apparent

11 exploitation of the subject matter. I have  
12 to strenuously object to this type of  
13 procedure.

14 THE COURT:

15 Why do you say it's improper? He's  
16 qualified as an expert in surveys and we have  
17 wide-open cross. What's the objection?

18 MR. GAY:

19 It has nothing to do with surveys,  
20 Judge. Nothing.

21 MR. MUEHLBERGER:

22 And there's been no showing under 602  
23 that this witness has any personal knowledge.  
24 He's already established that.

25 MR. RUSS HERMAN:

26 He's an expert, not a fact witness. It  
27 applies to fact witnesses, Number 1. Number  
28 2, you put up --

29 THE COURT:

30 Mr. Williams, anything for the record?

31 MR. WILLIAMS:

32 No, Your Honor.

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1 THE COURT:

2 Objection is overruled.

3 (End of sidebar.)

4 THE COURT:

5 The objection is overruled.

6 You may highlight the portion of the  
7 letter that was requested to be highlighted.

8 EXAMINATION BY MR. RUSS HERMAN:

9 Q. Dr. Viscusi --

10 THE COURT:

11 Make sure your microphone is on, Mr.  
12 Herman.

13 MR. RUSS HERMAN:

14 Thank you, Judge. It's on, but the  
15 power is off. I hit the wrong button again.  
16 I'm sorry. Thank you.

17 EXAMINATION BY MR. RUSS HERMAN:

18 Q. Were you shown this letter about what the --  
19 what this tobacco company, R.J. Reynolds, in 1990,  
20 was advising a fifth-grade class of with regard to  
21 cigarette smoking and health?

22 A. I haven't seen the letter that was sent to  
23 the principal.

24 Q. Now -- may I have that back, please? Thank  
25 you.

26 Sir, I'm going to direct your attention  
27 to Exhibit 0255, admitted in evidence on February  
28 7th, 2003, to this jury, dated May 1st, 1963, and  
29 ask you if you have seen this letter written to  
30 fourth graders at the Geiger School.

31 A. The answer to your question is no, I haven't  
32 seen the letter.

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1 MR. RUSS HERMAN:

2 Your Honor, I'd like it put on the  
3 screen, and may I publish?

4 MR. GAY:  
5 Objection.  
6 THE COURT:  
7 Overruled.  
8 You may publish.  
9 MR. RUSS HERMAN:

10 Now, Carl, would you put the date,  
11 please, and the addressee? And it's  
12 written -- the jury can see the date, to whom  
13 it's written.

14 Carl, would you go to the highlighted  
15 portion I premarked now. The fourth  
16 paragraph, the sentence that begins  
17 "Despite."

18 Would you take the first sentence, Carl,  
19 and blow that up?

20 EXAMINATION BY MR. RUSS HERMAN:

21 Q. Sir, so, now my question is: You were not  
22 aware before you took the stand that from 1963 to  
23 1990, grade-school children were being advised that  
24 science could not establish smoking as a causal link  
25 with human disease; is that correct?

26 MR. WITTMANN:

27 Objection, Your Honor. May we approach?  
28 (Whereupon, a sidebar conference is held  
29 off the record.)

30 THE COURT:

31 Mr. Wittmann?

32 MR. WITTMANN:

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1 Mr. Herman's got --  
2 MR. RUSS HERMAN:  
3 Excuse me, Phil. I've got to turn this  
4 off. Go ahead.  
5 MR. WITTMANN:  
6 Mr. Herman has two letters from which he  
7 wants to make this sweeping generalization  
8 that from 1963 to 1990 students were being  
9 advised such and such and such and such.  
10 There's no basis for that question. It's an  
11 objectionable question. He has two letters  
12 and all he's got is two letters, and the  
13 witness knows nothing of any other letters.  
14 He didn't know anything of these two.

15 THE COURT:  
16 Anything else for the record?

17 THE COURT:  
18 The objection is overruled.  
19 (End of sidebar.)

20 THE COURT:  
21 The objection is overruled.  
22 You can answer the question. You

23 remember the question? You want me to read  
24 it back?

25 THE WITNESS:  
26 Yeah, please.  
27 THE COURT:  
28 Sir, so, now, my question is: "You were  
29 not aware before you took the stand that from  
30 1963 to 1990 grade-school children were being  
31 advised that science could not establish

1                   is that correct?"

2   A.    That's correct.

3   EXAMINATION BY MR. RUSS HERMAN:

4   Q.    I want to go to another one of your surveys.  
5   Let's go to any slide that you put up for this jury  
6   of Gallup Polls. Well, the ones that I have labeled  
7   were 3072.

8                   MR. RUSS HERMAN:

9                   Put up 3072, please.

10                  MR. MUEHLBERGER:

11                  This is not one we used, Russ.

12                  MR. RUSS HERMAN:

13                  Which one did you use, Counselor?

14                  MR. GAY:

15                  3058.

16                  MR. RUSS HERMAN:

17                  Put up 3058.

18                  MR. RUSS HERMAN:

19                  That's not the one I'm talking about.

20                  You had -- you used a Gallup Poll.

21                  MR. MUEHLBERGER:

22                  Try 3068.

23                  MR. RUSS HERMAN:

24                  Yeah, 3068. You put up 3068? Okay.

25                  May we publish, Your Honor?

26                  THE COURT:

27                  Yes.

28   EXAMINATION BY MR. RUSS HERMAN:

29   Q.    Sir, with reference to the Gallup Poll in  
30   1954, didn't Gallup come out and criticize R.J.  
31   Reynolds for using that poll and misinterpreting it?

32                  MR. MUEHLBERGER:

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1                  Objection, Your Honor. May we approach?

2   THE COURT:

3   Yes.

4   (Whereupon, a sidebar conference is held  
5   as follows:)

6   THE COURT:

7   Mr. Muehlberger?

8   MR. MUEHLBERGER:

9   Your Honor, the objection is hearsay.

10                 This has come up before with Dr. Cummings.

11                 Mr. Herman is asking one criticism by one  
12                 person involved at one point in time about  
13                 somebody else's use of this. It's pure  
14                 hearsay. If someone from Gallup were here to  
15                 talk about this, fine. He's asking now for  
16                 pure hearsay as to what he's heard about what  
17                 Gallup said.

18                  MR. RUSS HERMAN:

19                  I can ask him if --

20                  THE COURT:

21                  Mr. Gay wants to say something, Mr.  
22                 Herman.

23                  MR. GAY:

24                  In addition, Your Honor, there's an

25 apparent statement out of a statement by  
26 Gallup that was made in connection with some  
27 other case in which the poll was being used,  
28 and it has no relevance to this case.

29 MR. MUEHLBERGER:

30 I have the transcript of the prior use.

31 THE COURT:

32 The objections are overruled. That's

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1 what redirect is for. I'm going to instruct  
2 him to answer the question.

3 (End of sidebar.)

4 THE COURT:

5 The objection is overruled. You may  
6 answer the question. Do you remember the  
7 question or shall I read it back?

8 THE WITNESS:

9 I remember this one, Your Honor.

10 THE COURT:

11 You may answer the question.

12 A. Dr. Gallup has never criticized the use of  
13 these polls, to the best of my knowledge. I believe  
14 that a staffer at Gallup, in an unpublished  
15 internal -- or memo may have criticized one expert's  
16 use of the polls, but to the best of my knowledge,  
17 nobody has ever criticized my use of the Gallup  
18 Polls in my publications or anywhere else.

19 EXAMINATION BY MR. RUSS HERMAN:

20 Q. Sir, listen to my question: Is it not a fact  
21 that the Gallup organization criticized R.J.

22 Reynolds' use of a 1954 poll?

23 A. I believe a staffer, Lydia Saad, not Dr.  
24 Gallup, who is deceased, did a critique of some  
25 historian's use of the polls, but not my use of the  
26 polls.

27 Q. Sir, I will show you Exhibit 0235.01, the --  
28 "The Gallup Organization, The Tobacco Industry  
29 Summons Polls to the Witness Stand" by Lydia Saad,  
30 the Gallup organization, and Steve O'Brien. The  
31 Gallup organization, May 15th, 1998.

32 MR. MUEHLBERGER:

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1 Objection, Your Honor. May we approach?  
2 (Whereupon, a sidebar conference is held  
3 as follows:)

4 THE COURT:

5 Mr. Muehlberger, your objection?

6 MR. MUEHLBERGER:

7 Hearsay, Your Honor. Apparently, it's a  
8 text of something that was utilized, a  
9 speech, somewhere in St. Louis. It was never  
10 peer-reviewed or published in any peer-  
11 reviewed journal.

12 MR. RUSS HERMAN:

13 I haven't asked a question yet.

14 THE COURT:

15 There is no question. If you want to  
16 read what Mr. Herman said, I have it on my  
17 laptop. It's not a question. He's showing

18 him this. There's no question about it and  
19 there's no offer.  
20 MR. MUEHLBERGER:  
21 All right.  
22 THE COURT:  
23 The next utterance may be objectionable,  
24 but that one is overruled.  
25 (End of sidebar.)  
26 THE COURT:  
27 The objection is overruled.  
28 Mr. Herman, ask the witness a question,  
29 please.

30 EXAMINATION BY MR. RUSS HERMAN:  
31 Q. Have you seen this criticism before?  
32 A. I have.

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18695

1 Q. You have?  
2 A. I have.  
3 Q. You have not?  
4 A. I have.  
5 Q. Oh, you have seen it before and you've  
6 reviewed it before, have you not?  
7 A. I've never read the whole thing, but I knew  
8 that it existed and I browsed through it, or some  
9 similar type of thing.  
10 Q. Were you familiar with the newspaper article  
11 published in the Wall Street Journal about Gallup's  
12 criticism of R.J. Reynolds' use of this poll in  
13 litigation?

14 MR. MUEHLBERGER:  
15 Objection. Objection, Your Honor. May  
16 we approach?

17 THE COURT:  
18 You may approach.  
19 (Whereupon, a sidebar conference is held  
20 as follows:)  
21 THE COURT:  
22 Mr. Muehlberger?  
23 MR. MUEHLBERGER:  
24 Your Honor, I think it was inadvertent.  
25 This document was not in evidence. Mr.  
26 Herman showed it up in front of the jury. It  
27 is not in evidence. I object to him  
28 displaying something and publishing it. It's  
29 not in evidence.  
30 MR. RUSS HERMAN:  
31 I didn't do that.

32 THE COURT:  
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1 Don't do it. Don't hold it up to the  
2 jury.  
3 Objection is overruled.  
4 (End of sidebar.)  
5 EXAMINATION BY MR. RUSS HERMAN:  
6 Q. Did you read the Wall Street Journal  
7 criticizing the use of the Gallup Poll in  
8 litigation?  
9 A. No. I knew an article existed, but I don't  
10 think I read that.

11 Q. That's the first time you've seen it?  
12 A. I believe so, yes.  
13 Q. Well, since you don't know about it and  
14 didn't know about it, I won't ask you about it.  
15 The Gallup polls, I noted that the ones  
16 you used didn't poll 18 and unders, did it.  
17 A. Eighteen and over, I believe, was the cutoff.  
18 Q. Right. Still no polling of -- by --  
19 supporting your surveys of 14-, 11-, 12-, 13-,  
20 15-year-olds, correct?  
21 A. No. That's right.  
22 Q. Let's go on to another issue. I want to talk  
23 to you about -- well, isn't it a fact that beginning  
24 in 1985, you were created by the tobacco industry as  
25 a witness to combat the notion that cigarettes were  
26 addictive?  
27 A. No, there's no truth to that whatsoever. In  
28 fact, I didn't start doing any work, even advising  
29 them on the hazard warning literature, until around  
30 '86 or '87. And I don't think they've ever talked  
31 to me about addiction. Addiction's something I came  
32 into independently as part of my two books.

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1 Q. Now, you had indicated that you had begun  
2 work for the cigarette companies in the 1980s, and  
3 in 1985, you went to Cleveland and Jones, Day law  
4 firm let you look through some drawers; isn't that  
5 correct?  
6 A. No, that was somewhere between '86 and '88.  
7 It was not in '85.  
8 Q. I'm in error. You found a 1985 survey,  
9 correct?  
10 A. That's correct.  
11 Q. And none of the lawyers for big tobacco, none  
12 of the cigarette company execs have ever talked to  
13 you about addiction.

14 MR. GAY:

15 Objection.

16 MR. MUEHLBERGER:

17 Objection.

18 EXAMINATION BY MR. RUSS HERMAN:

19 Q. Is that your testimony?

20 THE COURT:

21 Answer -- approach the bench, please.

22 (Whereupon, a sidebar conference is held  
23 as follows:)

24 THE COURT:

25 First of all, I think it's a compound  
26 question, but I'll hear the objections.

27 MR. GAY:

28 It's just a continuous parade of  
29 inflammatory remarks from Mr. Herman.  
30 "Lawyers for big tobacco" and just parading  
31 all these inflammatory remarks is  
32 prejudicial. It appeals to passion. It's

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1 inappropriate.

2 MR. RUSS HERMAN:

3 There have been documents in this trial

4 that refer to these cigarette companies as  
5 "big tobacco." That's Number 1. Number 2,  
6 he said that no one ever talked to him from  
7 these companies about addiction. There's  
8 nothing inflammatory about this. It's  
9 factual.

10 MR. GAY:

11 The jury can hear everything you're  
12 saying.

13 THE COURT:

14 Lower your voice. It's at least a  
15 compound question. I'll instruct the witness  
16 not to answer it for that reason. Try again.

17 MR. RUSS HERMAN:

18 Sure.

19 (End of sidebar.)

20 THE COURT:

21 That is a compound question and the  
22 objection is sustained.

23 Don't answer that question.

24 Next question, please.

25 EXAMINATION BY MR. RUSS HERMAN:

26 Q. I apologize again. Sometimes my foot falls  
27 out of my mouth and words just run out. So, I'll  
28 break it down.

29 Sir, are you telling us in this  
30 courtroom that in the 14 to 20 years you have been  
31 doing work for the cigarette companies, no cigarette  
32 company executive has ever discussed addiction with  
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1 you, nicotine addiction.

2 A. I don't think I've -- meet cigarette company  
3 executives very often. The only time I recall  
4 dealing with cigarette company officials is when I  
5 consulted on the design for the Premier cigarette  
6 warning label. Otherwise, it's lawyers representing  
7 the industry.

8 Q. Sir, my question is: You have never  
9 discussed nicotine addiction with any company  
10 employee of a cigarette company; is that correct?

11 A. I believe that's true.

12 Q. And you've never discussed nicotine addiction  
13 with any of the lawyers representing the cigarette  
14 companies; is that correct?

15 A. No. In fact, as you know, I've -- this is  
16 not the first case in which I've been deposed or  
17 testified on the addiction issue.

18 Q. Sir, I'm not talking about some economic  
19 theory of addiction. I'm talking about nicotine  
20 addiction. Haven't you discussed with the cigarette  
21 company lawyers nicotine addiction?

22 A. Did I ever ask the lawyers, is nicotine  
23 addictive from a medical standpoint? Is that what  
24 you're asking?

25 Q. I'll try to do it again. Sir, are you  
26 telling us that you have never discussed with the  
27 cigarette company lawyers in the 14 to 20 years  
28 you've been working with the cigarette companies  
29 that idea that nicotine addicts people, are you  
30 saying that?

31 A. That certainly has come up because I've

32 written about nicotine addiction.  
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18700

1 Q. And has it come up that Shook, Hardy has  
2 indicated to the cigarette companies that it has a  
3 position in litigation about cigarette addiction?  
4 Have you ever discussed that with the lawyers from  
5 Shook, Hardy?

6 MR. GAY:  
7 Objection. Privilege.  
8 THE COURT:  
9 Overruled.

10 Answer the question if you're able to.  
11 A. No, I've never discussed their position.

12 EXAMINATION BY MR. RUSS HERMAN:

13 Q. Sir, when you were here last, you indicated  
14 you had seen some Tobacco Institute surveys. Do you  
15 recall saying that, sir?

16 A. Yes. I have seen some over the years.

17 Q. And you know the Tobacco Institute is a  
18 defendant in this case with these cigarette  
19 companies; isn't that correct? You do know that,  
20 don't you?

21 A. Didn't know that, but I have no reason to  
22 dispute it.

23 Q. You know that the Tobacco Institute was  
24 formed by the companies, the cigarette companies, as  
25 a public relations arm and as a lobbying arm; isn't  
26 that true?

27 A. Yes, and they also gather data on tobacco as  
28 well.

29 Q. All right. I'm going to show you Exhibit  
30 3359.01, which has been admitted in evidence on  
31 February 13th, 2003, from Mr. K-N-O-P-I-C-K of the  
32 Tobacco Institute to Mr. Kloepfer. The document's

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18701

1 dated 9/9/1980.

2 MR. RUSS HERMAN:  
3 I'd like to put it on the screen, Your  
4 Honor. It's been previously admitted.  
5 I'd like to publish, Your Honor.  
6 THE COURT:  
7 Objection. Hearing none, you may  
8 publish.  
9 MR. RUSS HERMAN:  
10 Carl, would you put up the first page,  
11 please? Would you put the date up? Carl, go  
12 to the second page. Would you put the last  
13 paragraph up.  
14 May we publish, Your Honor?

15 THE COURT:  
16 You may publish.  
17 MR. RUSS HERMAN:  
18 Would you enlarge it, please?

19 EXAMINATION BY MR. RUSS HERMAN:

20 Q. You see the words, Shook, Hardy there?  
21 A. I do.  
22 Q. Same law firm that was on the 1985 lawsuit  
23 purpose survey, correct?  
24 A. That's correct.

25 Q. You'll see where it says:  
26 "Shook, Hardy reminds us, I'm told, that  
27 the entire matter of addiction is the most  
28 potent weapon a prosecuting attorney can have  
29 in a lung cancer/cigarette case. We can't  
30 defend continued smoking as 'free choice' if  
31 the person was 'addicted.'"  
32 You see that?

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18702

1 A. I do.

2 Q. Aren't you Shook, Hardy's answer to addiction  
3 by trying to shift focus from nicotine addiction to  
4 something called economic addiction?

5 A. Well, the answer to addiction is people's own  
6 behavior. So, the fact that almost as many smokers  
7 have quit smoking as continue to smoke, the fact  
8 that smokers are price responsive and respond to  
9 smoking restrictions indicate that not all smokers  
10 are locked in to smoking. This doesn't mean that  
11 smoking isn't hard to quit for many people.

12 Q. Sir, isn't that the party line developed for  
13 your testimony?

14 A. No. This is what I've written in my books.  
15 Nobody developed it for me. I've written about this  
16 for the past 15 years.

17 Q. Yes, sir. Ever since you've been hired by  
18 tobacco, you've been writing this material; isn't  
19 that true?

20 A. I've been writing about tobacco for the past  
21 15 years -- I've been writing -- all my -- none of  
22 my work is supported by the industry.

23 Q. I just have one more question, or series of  
24 questions, before we break for lunch, as is our  
25 custom.

26 Sir, are you familiar with a quotation  
27 to the effect: "Don't complain about a dust mote in  
28 someone's eye when there's a beam in your own"?

29 A. I don't know the quotation.

30 Q. Do you know the quotation: "Let him without  
31 sin cast the first stone"?

32 A. I do.

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18703

1 Q. When you were here last week, one of your  
2 Harvard professors criticized your work and you  
3 said, Judge Weinstein in some other case wouldn't  
4 accept his testimony. Do you recall that?

5 A. I said Judge Weinstein concluded after his  
6 testimony that it had no veracity.

7 Q. And you testified to that, which was a  
8 personal statement, isn't it true that a judge less  
9 than a month ago said that your testimony was not  
10 credible in his court?

11 A. I've never heard any such statement. In  
12 fact, the judge I testified a month ago told my  
13 lawyers that I was the best witness he'd seen in the  
14 case.

15 Q. Really?

16 A. Or the smartest witness he'd seen, yes.

17 Q. Really? Well, that's something, because you

18 know you've written that judges and juries don't  
19 really understand these scientific matters.

20 MR. GAY:

21 Objection. Objection, Your Honor.

22 MR. WILLIAMS:

23 Objection, Your Honor.

24 THE COURT:

25 Sustained.

26 Don't answer that question.

27 The jurors will disregard.

28 Next question, please.

29 EXAMINATION BY MR. RUSS HERMAN:

30 Q. Just one more question in the series. I need  
31 your help. I have to find that legal opinion that  
32 the Judge wrote.

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18704

1 MR. MUEHLBERGER:

2 Objection. Judge, may we approach?

3 THE COURT:

4 Yes.

5 EXAMINATION BY MR. RUSS HERMAN:

6 Q. Did you --

7 THE COURT:

8 Just a moment. There's an objection,

9 Mr. Herman.

10 MR. RUSS HERMAN:

11 Oh, okay.

12 (Whereupon, a sidebar conference is held  
13 as follows:)

14 THE COURT:

15 Mr. Muehlberger?

16 MR. MUEHLBERGER:

17 Your Honor, my objection is that Mr.

18 Herman continues to quote from documents that  
19 are -- characterize documents that are not in  
20 evidence, many of which are hearsay, the  
21 Gallup article in the Wall Street Journal.

22 He reads the title. It's not in evidence.

23 It's hearsay. The proper way is to put an  
24 exhibit before the witness and let us object.

25 He's now characterizing to some legal  
26 opinion, I don't know what it is, he has  
27 already characterized it, it's not in  
28 evidence.

29 THE COURT:

30 You have the opinion?

31 MR. RUSS HERMAN:

32 I sure do, and he says this judge says

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1 he was the best --

2 THE COURT:

3 Is it published?

4 MR. RUSS HERMAN:

5 Yeah. Sure, it is. He's the one that  
6 opened the door, Judge, talking about Judge  
7 Weinstein and attacking the witness and then  
8 just telling us that he's a great witness.

9 It's impeachment.

10 MR. MUEHLBERGER:

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18706

10 THE COURT:  
11 I sustain the objection to questions  
12 about this judge's opinion of this witness --  
13 MR. RUSS HERMAN:  
14 Excuse me?  
15 THE COURT:  
16 I sustain the objection.  
17 Next question, please.  
18 (End of sidebar.)  
19 THE COURT:  
20 The objection is sustained.  
21 Next question, please.  
22 Mr. Herman, it's about lunchtime. Are  
23 you about --  
24 MR. RUSS HERMAN:  
25 Your Honor, that's a good idea.  
26 THE COURT:  
27 We will recess until 1:30 by the wall  
28 clock.  
29 (Jury excused.)  
30 THE COURT:  
31 Let the record reflect the jury left the  
32 courtroom.

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1 REPORTER'S CERTIFICATE

4 I, CAROL VALLETTE SLATER, Certified Court  
5 Reporter, Registered Professional Reporter, do  
6 hereby certify that the foregoing proceedings were  
7 reported by me in shorthand and transcribed under my  
8 personal direction and supervision, and is a true  
9 and correct transcript, to the best of my ability  
10 and understanding;

11 That I am not of counsel, not related to  
12 counsel or the parties hereto, and not in any way  
13 interested in the outcome of this matter.

19 CAROL VALLETTE SLATER (CCR 78020)  
CERTIFIED COURT REPORTER  
20 REGISTERED PROFESSIONAL REPORTER

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